



African Policing Civilian Oversight Forum

Submission on the proposed Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022

31 January 2023

1. Introduction

The African Policing Civilian Oversight Forum (APCOF) welcomes the opportunity to make this submission to the Department of Justice and Constitutional Development (the Department) in response to the call for public comment on the proposed Criminal Law (Sexual Offences and Related Matters) Amendment Bill, 2022. We are a not-for-profit trust based in Cape Town, working on issues of police accountability and governance in Africa. We commend the Department for inviting public comments and inputs in respect of this Amendment Bill, in accordance with the Department's constitutional obligations to facilitate effective public participation in the law making process.

2. Observations regarding the proposed Bill

We welcome the stated objectives of the Amendment Bill. In particular, we support the provisions that decriminalise the sale and purchase of adult sexual services and activities between consenting individuals, and expunge criminal records of persons convicted of, engaged in, rendering or receiving sexual services from persons 18 years or older. We emphasise that this will, *inter alia*, strengthen existing interventions to address the underlying conditions that foster

sexual and gender-based violence (GBV), reduce social-economic marginalisation of historically vulnerable persons, and give effect to South Africa's constitutional, regional and international human rights obligations to address sexual and GBV.

We also welcome a further intention of the Amendment Bill to repeal The Sexual Offences Act 23 of 1957. This will have the impact of expunging the last vestige of colonial-era legislative tools that criminalise commercial sex work, and give effect to South Africa's human rights obligations to review and repeal laws and rules that establish or sustain discrimination and socio-economic marginalisation.

However, while we commend and support the Amendment Bill and its objectives, we believe further legislative interventions are required to deepen existing efforts to address sexual and GBV, and the marginalisation and exclusion of commercial sex workers. As a result, we make the following observations, which we believe will contribute to strengthening the Amendment Bill, to ensure commercial sex and related activities take place in an environment that respects the fundamental human rights and freedoms of all, and gives effect to South Africa's domestic and international law obligations.

2.1 Observation 1: Absence of regulatory provisions in the Amendment Bill

While the Amendment Bill proposes to decriminalise the sale and purchase of adult sexual services, it does not make any provision for, or envisage, the regulation of commercial sex, following the decriminalisation. The absence of a regulatory instrument that regulates sex work in a rights-compliant manner, following the decriminalisation, will risk the exploitation and abuse of commercial sex workers. At a minimum, the regulatory instrument should, inter alia, provide minimum standards and conditions of work that are compatible with legislative framework that governs labour relations in the country, and guarantee appropriate access to legal services and reproductive health services for commercial sex workers.

In addition, as the Department is aware, there are Metropolitan Municipal by-laws, across all nine provinces, that criminalise activities such as loitering or sleeping in public places.¹ We are concerned that these laws may be used to target commercial sex-workers, and continue to put them at risk of abuse and exploitation by law enforcement officials. The regulation of commercial

¹ For greater and more specific detail on the by-laws and their human rights impact, see: <https://apcof.org/wp-content/uploads/030-study-on-decriminalising-poverty-in-south-africa-clare-ballard-patrick-burton-louise-edwards-abdirahman-maalim-gossar-and-chumile-sali.pdf>.

sex work, and the policing of public spaces, should be responsive to the potential for municipal by-laws to undermine sex workers' access to justice, and dignity, and municipalities should be encouraged to decriminalise by-laws which have, or are used, to this effect.

Recommendation: To enhance the protection of the rights of sex workers, reduce incidents of GBV and strengthen South Africa's compliance with its constitutional, regional and international law obligations, the Bill should provide for the non-discriminatory and human-rights compliant regulation of commercial sex. This should be included either as part of a revised text of the Amendment Bill or in a separate legislative instrument.

2.2 Observation 2: A lack of positive obligations on the police

Given that gender bias is deeply rooted in our society and is endemic to the police response to GBV, there is a need to include detailed positive duties on the police to proactively protect and give effect to the rights of sex workers. This is necessary in order to address the socio-economic aspect underlying sex work and to improve access to integral social services, such as health care, for sex workers.

Recommendation: To support the intentions of the Bill and to give effect to the National Strategic Plan on GBV and Femicide, which recognises the interlinkages between socio-economic status and gender inequality and GBV, we recommend the inclusion of positive duties on the South African Police Services under an inserted section 4.

Section 4: "Any member of the South African Police Services must, when assisting any sex worker, render such assistance as may be required in the circumstances, including assisting or making arrangements for the complainant to find suitable shelter, and to obtain access to health care services, including access to post exposure prophylaxis, in a manner that respects and protects their rights to dignity, autonomy and equality."

As the SAPS will be integral to the implementation of this Bill, section 4 should also be amended to include provision for the issuance of Directives, in the form of standing orders or national instructions, by the National Commissioner of the SAPS. Given the intersecting axes of vulnerability experienced by sex workers, we also recommend that section 4 include a provision that the National Prosecuting Authority and the SAPS develop and provide training of all its members within a period not exceeding 12 months of the ensuing Bill.

2.3 Observation 3: Reporting on implementation of the Bill

As part of monitoring the implementation of the this new Bill, the Minister of Justice and Constitutional Development, the South African Police Service, and the National Prosecuting Authority should be required to collect, analyse and report data on sex workers and the crimes they experience. There is a particular need for data disaggregated by sexual orientation and gender identity.

Accordingly, we recommend that an additional section should be inserted to specifically require the Minister of Justice, the South African Police Service and the National Prosecuting Authority to publish such data in their respective annual reports.

3 Conclusion

We thank the Department of Justice and Constitutional Development for the current iteration of the Bill. It is a commendable step towards giving effect to the National Strategic Plan on GBV and Femicide and towards fostering gender equality within South Africa. We believe that the Bill has the potential to give effect to the NSP's goal to improve accountability and leadership, and to recognise the intersection between socio-economic vulnerability and gender inequality.

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